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No. 85-2023

In The
Supreme Court of the United States
October Term, 1986

KERR-McGEE CORPORATION and
ZAPATA OFFSHORE COMPANY,

Petitioners,

vs.

TIMCO SERVICES, INC. and
ROYALE BELGE INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMICI CURIAE

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RULE 28.1 DECLARATION

Pursuant to Supreme Court Rule 28.1 Timco Services, Inc. and Royale Belge Insurance Co. state that they are affiliated to the following corporations:

DOUCET, INC.

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Respondents, Timco Services, Inc. and Royale Belge Insurance Co., submit this brief in opposition to the motion of six oil companies to file an amici curiae brief in support of the Petition for Writ of Certiorari by Kerr-McGee Corporation and Zapata Offshore Company.

The Motion to File Amici Curiae Brief was not received until September 21, 1986, and, accordingly, this opposition has been prepared hastily and initially is submitted in typewritten form.

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SMALL CASE OF NO NATIONAL SIGNIFICANCE

Timco and Royale Belge waived their right to file a brief in opposition to the Petition for Writ of Certiorari for the reasons that the decision of the Court below patently was correct and that the cost of litigation of this relatively small, routine personal injury case has become utterly burdensome. Now six rich oil companies wish further to abuse the legal system of our country by filing an amici curiae brief. The original complaint of Matte was settled by Kerr-McGee and Zapata in 1984 for $35,000.00. Kerr-McGee and Zapata prosecuted their unworthy third-party complaint for indemnity through extensive motion practice in the District Court and the Court of Appeals, and, together with their six wealthy friends, they now wish to pursue the matter in the nation's highest court. Unquestionably, the legal fees for this brief writing long since have exceeded the amount originally in dispute. To allow filing of the amici curiae brief in support of the petition for writ would condone these oil companies' abuse of their greater economic resources.

Further, the case involves the application of the Louisiana Oil Field Indemnity Act, La. Rev. Stat. Ann. § 9:2780. Obviously, the construction of the Act directly affects only Louisiana. All applicable decisions of the District Courts and Fifth Circuit are consistent, and no decision of any other Court is contrary. Accordingly, no issue of national significance is involved.

In addition, the motion to file amici curiae brief is made at the eleventh hour, long after the original petition was filed. The motion is made well beyond the time provided by Supreme Court Rule 36, and movers have offered no excuse for their delay. The amici curiae brief makes a new argument not presented in the District Court, in Court of Appeals, or in petition of Zapata and Kerr-McGee. Any consideration of such argument at this time would be improper and unfair to Timco and Royale Belge.

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DECISION BELOW CORRECT

While initially a brief in opposition to the petition was thought unnecessary, in view of the Motion to File Amici Curiae Brief, Timco and Royale Belge will comment briefly.

The question on which a Writ of Certiorari is sought is whether under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Lands Act) there is a gap permitting the use of the Louisiana Oilfield Indemnity Act, or whether *United States v. Seckinger*, 408 F.2d 146 (5th Cir. 1969), *rev'd on other grounds*, 397 U.S. 203, 90 S.Ct.

880, 25 L.Ed. 2d 224 (1970), is "well established" federal common law and preempts the use of state law.

In drafting the Lands Act, Congress considered the possibility of applying admiralty law in order to have uniform Federal rules, but Congress rejected this idea. Rather, Congress chose to fill in the gaps in Federal statutes and regulations through adoption of state law. 43 U.S.C. §1333(a)(i); *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed. 2d 1360 (1969). In so providing, Congress expected and intended that the law applicable on the Outer Continental Shelf adjacent to the different coastal states would vary substantially. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103-105, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971). Adoption of the argument of Kerr-McGee and Zapata would undermine the differences in state law and frustrate the intent of Congress.

Federal law is based upon the Constitution and Statutes of the United States. Many questions of commercial or contract law are not answered by the Constitution and statutes, and Federal Courts sitting in cases of federal question jurisdiction occasionally are required to create the so-called federal common law. In the present case there is no need to create or apply such law. In the Lands Act, Congress clearly expressed an intent that the Court would look to the law of the adjacent state.

Further, the interpretation advocated by Kerr-McGee and Zapata would be unworkable because it would lead to crippling uncertainty. In a Lands Act case there may be a gap to be filled by state law. What happens if another Federal Court sitting in Federal question jurisdiction

comments on the subject? Did an established federal common law rule come into existence preempting state law? Must the comment be integral to the holding or will dicta suffice? Is one holding sufficient or are more required to make "established" federal common law? Is a holding by a District Court sufficient or must the comment be by a Court of Appeals or even this Court? Surely Congress did not intend such uncertainty.

In addition, the Complaint of Matte against Kerr-McGee and Zapata was governed by state law, and it would be anomalous to decide the related indemnity question based on any other law. Cf. *Huson*, *supra*, 404 U.S. at 103 (anomalous to apply state substantive remedy and federal laches doctrine). The Louisiana Oilfield Indemnity Act is a vital and important part of Louisiana law, La. Rev. Stat. Ann. 9:2780(A), and it would be improper to allow Matte to recovery under Louisiana substantive principles but not apply correlative Louisiana indemnity principles.

Moreover, *Seckinger* is not "well established" federal law common law on the point in controversy, and, in this respect, the present case is similar to *Huson*, *supra*. In *Huson*, a Lands Act case, it was argued that in lieu of state prescription for a state cause of action, the Court should apply laches under the Federal common law. This Court rejected this argument for the reason that there was no well established federal common law rule of laches and Congress had intended to give state law broader scope. Similarly, the alleged Federal common law rule here is not well established. Petitioners rely on *Seckinger*, *supra*, but that decision was made expressly for the purpose of establishing a uniform rule under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* *Seckinger*, *supra*, 408 F.2d

at 149. The Court determined that under the Federal Tort Claims Act uniformity is a significant national priority, whereas the Lands Act itself makes clear that the applicable law will vary with the law of the adjacent state.*

Finally, amici curiae make a new, though specious, argument with respect to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* Amici curiae correctly point out that no provision of the Longshore and Harbor Workers' Compensation Act prohibits indemnity agreements between employers and non-vessel third-parties; however, the failure of the Act to make such a prohibition does not preempt the application of other law. The Longshore and Harbor Workers' Compensation Act leaves the states free to enact anti-indemnity provisions with respect to non-vessel owners, and Louisiana has done so.

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*All of the cases cited by petitioner and amici curiae as following *Seckinger* can be distinguished. Three were decided under statutes providing for liability of the United States and are inapposite in a Lands Act case. *Gibbs v. United States*, 599 F.2d 36 (2d Cir. 1979); *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974); *United States v. Hollis*, 424 F.2d 188 (4th Cir. 1970). Five are admiralty cases and clearly inapplicable under *Rodrigue, supra*. *Seal Offshore, Inc. v. American Standard, Inc.*, 736 F.2d 1078 (5th Cir. 1984); *Corbitt v. Diamond M Drilling*, 654 F.2d 329 (5th Cir. 1981); *M.O.N.T. Boat Rental v. Union Oil Co.*, 613 F.2d 576 (5th Cir. 1980); *Wedlock v. Gulf Mississippi Marine Corp,*. 554 F.2d 240 (5th Cir. 1977); *Transcontinental Gas Pipeline Corp. v. Mobil Drilling Barge*, 424 F.2d 684 (5th Cir. 1970). The remaining three are diversity cases decided under state law or cases governed by the law of the Virgin Islands, and obviously are not authority for Federal common law. *Tran v. Manitowoc Engineering Co.*, 767 F.2d 223 (5th Cir. 1985); *Eastern Airlines, Inc. v. Insurance Co. of North America*, 758 F.2d 132 (3rd Cir. 1985); *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands*, 757 F.2d 1427 (3rd Cir. 1985).

CONCLUSION

The litigation cost of this small personal injury case has greatly exceeded the amount in controversy, and the Motion to File Amici Curiae Brief was not made until long after the time provided by Supreme Court Rule 36. Further, under the Lands Act, *Seckinger* does not create federal common law preempting the application of the Louisiana Oilfield Indemnity Act. Accordingly, the decision of the Court below is correct, and the Motion to File Amici Curiae Brief and Petition for Writ should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that this Opposition to Motion for Leave to File Brief on behalf of Amici Curiae has been served on petitioners and Amici Curiae through their counsel of record Christopher Tompkins and Howard L. Murphy of Deutsch, Kerrigan & Stiles, 755 Magazine Street, New Orleans, Louisiana. 70130 and Donald R. Abaunza and William Waitmell Hill Pugh, III of Liskow and Lewis, One Shell Square, 50th Floor, New Orleans, Louisiana, 70139-5001, by placing a copy of same in the United States mail. postage prepaid, this 23rd day of September, 1986.

EDWARD F. LEBRETON, III
MARY CAMPBELL HUBBARD